An Exotic Right

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The Spanish Supreme Court has finally issued a ruling on the trial to the Catalan secessionist leaders for the facts occurred in September and October of 2017 – namely, the passage of the referendum and the independence acts, several demonstrations, the referendum of October 1st, and the declaration of independence in October 27th. This ruling will definitely not help to solve the conflict. Quite on the contrary, it will make it intractable in the short run, as we are beginning to see in the riots in the streets of Barcelona. In my opinion, this ruling is unjust and legally wrong. Even worse, it is unconstitutional since it compromises the fundamental democratic rights of protest – the freedom of expression, the freedom of assembly, and the right to demonstrate.

Let us remember, first, the basic facts (my previous analyses of those facts are here, here, here and here): Two years ago, 12 people were indicted by the Supreme Court (after controversially taking the case out of the Catalan court that had initial jurisdiction), among them the former Vice-President of the Catalan government, Oriol Junqueras, several former ministers of that government, and the leaders of the two major civil society secessionist organizations, Jordi Cuixart and Jordi Sánchez. Other leaders, such as former President Carles Puigdemont, as well as other former ministers have remained in several countries (Belgium, Switzerland and the UK) avoiding the trial. Most of those who were indicted have been in pre-trial detention, in my opinion and in many others' unjustifiably, even if several of them were members, first, of the Catalan parliament, and then elected members of the Spanish chambers, and finally some of the European Parliament as well. All this adds more complexity to the political dimension of this trial, which, from the beginning, was perceived by many (you can find my own analysis of this aspect here) as an unwise strategy of judicializing a political conflict. The trial took 17 weeks, 52 sessions, with 422 witnesses, and many procedural issues that made it particularly complicated.

The judgment has found them all guilty of several offences – seven of them of sedition, four of which also of misappropriation of public funds, and the other three of disobedience to an authority. They have been sentenced, respectively, to 13 years in prison and absolute disqualification (in the case of Junqueras), 12 years in prison and absolute disqualification (Romeva, Turull, Bassa), 11 and six months in prison and absolute disqualification (Forcadell), 10 and six months in prison and absolute disqualification (Forn and Rull), 9 years in prison and absolute disqualification (Cuixart and Sánchez), and finally, for three of them (Vila, Mundó and Borràs), to pay a fine of 60.000 euros each and special disqualification of public service for 1 year and 8 months. To be clear on this: the sentence is very harsh. Even if the Spanish criminal code is quite punitivist compared to many other continental European criminal codes, many of them have been sentenced as if they had committed a homicide (which is punished in Spain with 10 to 15 years in jail). It is true that they

have been acquitted of the charge of rebellion (which might have led them to much higher sentences). But 9 to 13 years is nonetheless a very harsh punishment.

The Supreme Court has tried them in first and unique instance. This means that there will be no second instance able to revise the qualification of the facts, even if the judgment may – and will – be appealed in front of the Constitutional Court, if the defenses consider that some fundamental rights of their defendants have been violated. Ultimately, the case will undoubtedly arrive, in one way or another, at the European Court of Human Rights. This will be, in any case, in several years. But in both courts, the Constitutional Court and the ECtHR, the appeals can only concern violations of human rights, and in principle cannot revise the legal qualification of the facts.

The ruling is 493 pages long, which makes it actually shorter than expected. The ruling of the case of the terrorist attacks in Madrid in 2014, for instance, which had a similar amount of witnesses and evidence, was 722 pages long. And the recent ruling by the Supreme Court on the *Alsasua* Case, a much simpler case of an aggression to some police officers, is 449 pages long, almost the same number of pages than this one. This, of course, does not necessarily mean anything. But the number of pages that the ruling spends on each of the parts is particularly telling. It spends less than 40 pages describing the proven facts of the case, and only 10 pages to justify the charge of sedition, while it spends 193 pages, 40% of the whole text, arguing that no fundamental right of the defendants had been violated during the process. It can be basically described as “a defensive ruling”; as if judges were fully aware that its destiny is to be appealed before the CC and the ECtHR.

But leaving these formal observations aside, what can we say about the content of the ruling? As I anticipated at the beginning of this post, in my opinion this ruling is unjust, legally wrong, and actually unconstitutional. A fine-grained, extensive analysis of the content of this sentence will of course take weeks and months. And lawyers will have to discuss it as thoroughly as possible. But let me show, in the context of a short blog post like this, and with the urgency of the moment, why I think the ruling is wrong.

Obviously, not all of it is wrong. The acquittal of the defendants on the charge of rebellion is fully just, since rebellion, according to article 472 of the Spanish Criminal Code, requires violence of a very specific kind: basically, a form of violence that is instrumental and conducive to the subversion, derogation or suspension of the constitutional order, among other possible aims. And everyone knows – in Spain and worldwide – that the Catalan secessionist movement has been, until now, essentially peaceful and civic. On the other hand, it is also publicly notorious that the offense of disobedience to a judicial authority was effectively committed by all of them. The Spanish Constitutional Court banned the referendum of October 1st, and, in the exercise of its jurisdictional powers, sent a specific order to the 12 defendants – among other people – not only to stop organizing the referendum, but to do all what they could to stop it. And far from doing it, they continued encouraging the people to vote. But the crime of disobedience to an authority, as I already pointed out, is only punished with a fine and with special disqualification for public office.

Regarding the charge of misappropriation of public funds, this is of course a very technical issue that must be carefully proven. Even if at first sight, there seems to be not enough evidence about how they specifically diverted public funds to cover the expenses of the organization of the referendum, I am not a specialist on this area and it well might be the case that such charge is justified and the corresponding sentence correct and just. In any case, and given the Spanish rules of combination of sentences, the actual impact of that charge on the final sentence of the four who have been found guilty of misappropriation is almost negligible.

Sedition

The main problem of the ruling lies in the sentence for sedition. Thus, let me focus on this. First of all, the crime of sedition is very peculiar, since many criminal codes do not include it. Criminal codes of different countries may criminalize different conducts, of course. But as we all know, they tend to agree on the most serious offenses – not so much on the sentences imposed on them –, even if with some exceptions. Sedition is precisely one of those exceptions. And countries such as Belgium or the UK do not have it anymore. Second, in the Spanish Criminal Code, the crime of sedition is established by article 544, in the part of the code devoted to crimes of public disorder (Title XXII), and not, as in the case of rebellion, in the part of crimes against the constitution (Title XXI). This is weird, since all the other crimes against public order are punished with 5 years or less, even those that require some violence, while sedition may be punished, in the case of being committed by public authorities – which is precisely the case of 7 of the 9 defendants sentenced for that crime –, with 10 to 15 years.

More importantly, the crime of sedition of article 544, as Spanish criminal law professors have been denouncing for decades, is quite indeterminate. It is described as “a public and *tumultuous* uprising with the aim of *unlawfully* preventing the enforcement of the law, or the functioning of any public authority, or the enforcement of *any administrative or judicial decision*” (emphases added). There is not much clue to know what tumultuous uprising means or whether the prevention of any enforcement of any kind of law or administrative decision may qualify as sedition. According to many, a tumultuous uprising must include some element of violence and some significant harm, and none of them occurred. To be fair, the only real harm that was produced in those weeks of September and October of 2017, as everyone knows, was the harm of the police officers beating with their sticks hundreds of voters in the referendum trying to scare them and prevent them from voting. But the mere fact that there is such controversy about the correct interpretation of the crime of sedition should have brought the Supreme Court to pick up the most restrictive interpretation of the crime, one that would have left out the conducts the responsibility of which has been attributed to the defendants. The principles of legality, *ultima ratio*, and *in dubio pro reo*, should have been enough for the acquittal of the defendants on the charge of sedition. Instead of this, the Supreme Court opted for an extensive and insufficiently argued interpretation of the crime of sedition.

The right to protest

But there is another and more important argument to be made here. The contours of the crime of sedition, as it applies to the circumstances of this case, are opposed to the area of the democratic rights of protest, like the freedom of expression, the freedom of assembly, and the right to participate in demonstrations. They oppose to each other. Thus, the more extensive the interpretation we make of the crime of sedition, the smaller the area of democratic rights of protest, and the other way around. During the trial, many analysts gave the example of the *Platform of people Affected by Mortgages*, a civil organization in Spain which during the worst years of the recent economic crisis has been very successful in preventing thousands of evictions being enforced by the police, to show that nobody never thought in a case like this constituting a crime of sedition. Another example that was given is the action of the *Indignados* movement (the Spanish Occupy) when in 2011 they besieged the Catalan Parliament, preventing the MPs to get into the chamber one day. Even if a few of them were indicted back then, the National Audience acquitted them on the charge of preventing the representatives to exercise their functions precisely because it considered that they were exercising their right to protest and demonstrate. It is true that the Supreme Court then repealed that decision and sentenced them to 3 years – even if now the case came to the Constitutional Court, which has not decided yet. But, in any case, nobody ever thought – not even the Supreme Court – of the possibility of accusing them of sedition.

In this ruling on the secessionist case, the Supreme Court seems to have been aware of such counterexamples, and has introduced three additional elements in the definition of sedition. The idea of a public and tumultuous uprising, according to the ruling, requires such uprising to be i) massive or crowded, ii) generalized in the territory, and iii) strategically planned. These three elements seem specifically designed to fit this case in an ad-hoc basis, and leave out the two counterexamples mentioned above. In the case of preventing evictions, they are strategically planned, but not really massive, and definitely not generalized. In the case of the siege to the Catalan Parliament, was clearly massive, perhaps also strategically planned, but definitely not generalized across the territory. Thus, the ruling concludes, in a key passage in page 283, “the right to protest cannot mutate into *an exotic right to physically prevent the police officers* to enforce the law or a judicial decision*”*.

But here it is the problem. The ruling assumes that, by definition, any form of physical impediment to the task of police enforcing the law is necessarily coactive and unlawful, and therefore cannot be the conceived as the exercise of a right. But the “physical impediments” for which they make the defendants responsible are not others than sitting peacefully in the doors of the ballot polling centers. If there is a paradigm of non-violent protest, that is a peaceful sitting-in, perhaps occupying some public area. This, by definition, causes some physical impediment to the police, if they receive the order to go through the area or to take the people out of it. But how might such conduct constitute sedition?

Take this final example. In 2011 we did not only have the siege to the Catalan Parliament. The *Indignados* or 15M movement had occupied thousands of squares

all over the territory of Spain. They were protesting under the motto of “you do not represent us”. Everything they did was non-violent. But they definitely violated some administrative norms that prevent people from camping in the squares. On May 27th 2011, the Catalan anti-riot police received the instruction to remove the campers from Plaza de Cataluña. When the patrols came, protesters sat in the floor and bent the head down. They were ordered to move. But they refused. And then the police beat them very harshly with their sticks for more than an hour. Let me be clear on this. Perhaps they did something illegal when disobeyed the authority. Civil disobedience involves some breaking of the law. But nobody thought in indicting them for sedition and sentencing them to 13 years, even if they presented “a physical impediment to prevent the police from enforcing the law”, and even if what they did was “massive, generalized across the territory, and strategically planned”.

But the Supreme Court justices should be aware that the right to protest is not *an exotic right* at all. It rather is, as the professor of Princeton and famous world advocate of republican political philosophy Philip Pettit advocates, the core of any true democracy. Citizens in a minimally advanced democracy must have the right to contest and protest any decision made by their authorities. This is what Pettit calls a contestatory democracy. And yes, a fully legitimacy democracy is one where you have fair and periodic elections, true representatives of the people legislating in a parliament, separation of powers, and hopefully many other deliberative and participatory processes of public engagement. But everything starts with the most basic right to protest and contest the decisions made by your authorities, which, again, is not an exotic right. More particularly in Spain, the right to demonstrate is a fundamental right acknowledged by the constitution that has priority over any other law from the parliament, including the Criminal Code. Which means that an extensive interpretation of the crime of sedition necessarily amounts to a restrictive, and therefore unconstitutional, interpretation of the right to protest and demonstrate.

For all these reasons, we must conclude that an extensive interpretation of the crime of sedition, as the one made by this Supreme Court’s ruling to fit in the facts of 2017, is unacceptable on legal and constitutional grounds. Therefore, the secessionist leaders should have been acquitted on that charge as well. We will see what happens next when the case arrives before the Constitutional Court. What is obvious to everyone is that the Catalan conflict is not only not fixed by this decision, but even farther away from finding a reasonable solution for it.

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